UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

PCA Central California
Corrugated, LLC,

Employer,

and Case 20-RC-248663

Association of Western Pulp
and Paper Workers,

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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Now comes the Employer, PCA Central California Corrugated, LLC ("The Employer") through its counsel, and pursuant to Section 102.67 of the Board's Rules and Regulations, requests review of the Decision and Direction of Election of the Regional Director of Region 20 dated November 1, 2019 ("DDE").

SUMMARY OF THE EMPLOYER'S POSITION

The Board should reverse the DDE; set aside the November 7, 2019 election; find that the truck drivers constitute a separate unit;[1] and direct the Regional Director to reopen the record to determine whether the Shipping Department employees are appropriately included in a production and maintenance bargaining unit as described herein.

First, the Regional Director deprived the Employer of due process by unilaterally amending the Petition after the close of hearing in order to include shipping employees in the petitioned-for unit of production employees, maintenance employees, and truck drivers. The Regional Director did so despite the following:

(a.) the Employer receiving no notice whatsoever that the Union sought to include shipping employees in the bargaining unit until the day of the hearing and after the hearing commenced, at the *earliest*. By amending the Petition after the close of hearing, the Regional Director deprived the Employer of its right to analyze the appropriateness of and adequately respond to the possible inclusion of shipping employees in the petitioned-for unit;

(b.) the Petitioner never moving to amend the Petition to include shipping employees, neither at the hearing nor any time thereafter;

[1] As discussed further below, the "truck driver" classification includes the "Hostler" and "Over-the-Road truck driver" job titles. Unless otherwise specified herein, the term "truck drivers" or "drivers" shall refer to both the Hostler and Over-the-Road truck driver job titles.

(c.) the Regional Director correctly ruling at the hearing that the issue of whether shipping employees should be included in the petitioned-for unit was a unit inclusion issue to be deferred until after the election. The Parties neither objected to nor expressed any confusion about the Regional Director's ruling, neither at the hearing nor any time thereafter; and

(d.) the Parties proceeding to present their respective cases at hearing with the express understanding, based on the Regional Director's ruling, that they were not litigating whether shipping employees shared a sufficient community of interest with the petitioned-for unit. The only issue that the Hearing Officer permitted to be litigated was whether the petitioned-for unit should be separated into two units, production and maintenance employees in one, and truck drivers in the other, and expressly prohibited the parties from litigating the issue of the inclusion of shipping department employees.

Second, the Regional Director's expansion of the voting group beyond the Petitioner's Petition is contrary to the unit determination principles of *PCC Structurals*, 365 NLRB No. 160 (2017). After initially ruling at the hearing that the parties could not litigate the issue of including shipping employees in the petitioned-for unit and that the inclusion of shipping employees would be deferred until after the election, the Regional Director reversed both of these initial rulings *sua sponte* and misconstrued the record evidence to conclude that shipping employees should be included in the unit, without making any specific findings that shipping employees shared a sufficient community of interest with the petitioned-for unit of production employees, maintenance employees, and truck drivers. The Regional Director improperly relied on the presumptive appropriateness of the "plant-wide" unit that she created with her *sua sponte* inclusion of shipping employees to improperly disregard the dearth of evidence that shipping employees shared any community of interest with the petitioned for unit. Indeed, the Hearing

Officer, consistent with the Regional Director's ruling, did not allow the Parties to present evidence at the hearing regarding the shipping employees' community of interest with the petitioned-for unit. Thus, any testimony regarding the purported commonalities between shipping employees and the petitioned-for unit cannot — and should not — be viewed as probative of their purported community of interest with production employees, maintenance employees, and/ or truck drivers.

Third, even assuming the evidence elicited at hearing was probative of the issue, the record evidence does not show that shipping employees shared a sufficient community of interest with production or maintenance employees, let alone with truck drivers.

Fourth, because the Regional Director did not allow the Employer an opportunity to rebut the presumption, she improperly relied on the presumptive appropriateness of the "plant-wide" unit that she created to disregard the numerous distinct interests held by truck drivers, as opposed to those of the production, maintenance, and (as far as the evidence reflects) shipping employees. As a result, the Regional Director improperly directed an election of "[a]ll full-time and regular part-time employees employed at the Employer's McClellan Facility in the Trucking, Production, Maintenance, and Shipping Departments; excluding all temporary employees, guards, and supervisors as defined by the Act" (DDE at 10). Even assuming the Regional Director properly created a "plant-wide" unit with her *sua sponte* amendment of the petition — and that shipping employees shared a sufficient community of interest with production and maintenance employees — the record evidence does not show that truck drivers share a sufficient community of interest with production or maintenance employees, let alone with shipping employees.

Finally, the DDE and Notice of Election issued by the Regional Director contained the wrong eligibility date of September 22, 2019, over a month before the correct eligibility date of October 27, 2019. The Regional Director's issuance of an Errata and Revised Notice of Election correcting the wrong eligibility date after the close of business on the day before the election, without postponing the election to provide the Employer three (3) business days to post the Revised Notices before voting began, potentially disenfranchised voters and defied the Board's rules and purposes of the Act. This is particularly troublesome given that only 126 employees out of a voting unit of 160 employees actually voted in the election, less than half of the employees in the voting unit (66/160) actually voted for the Petitioner, and a swing of only three votes would have resulted in the Petitioner losing the election.

For these reasons, the Board should grant this Request for Review.

FACTS

I. PETITION AND REGIONAL DIRECTOR'S DECISION REGARDING SHIPPING EMPLOYEES

On September 23, 2019, the Association of Western Pulp and Paper Workers ("Union") filed an RC petition with Region 20 of the NLRB, seeking to represent a bargaining unit "production employees including maintenance and Truck drivers" at the PCA Central California Corrugated, LLC ("Employer") facility in McClellan, California. ("Petition"). The Petition made reference to neither shipping nor shipping employees. A Representation Hearing commenced on October 8.

The Employer's Statement of Position set forth the Employer's position that the petitioned-for unit was inappropriate and that the classifications sought could be an appropriate unit if separated into two units, production and maintenance in one, and truck drivers in the other. The Employer neither referenced shipping employees in any proposed unit contained in

its Statement of Position nor included shipping employees in the Employee List because the Petition did not reference shipping employees. The Employer timely served its Statement of Position and the Employee List on the Hearing Officer and the Petitioner the day before the hearing.

On October 3, the Regional Field Examiner issued a proposed Stipulated Election Agreement prepared by the Regional Office expressly including only "production employees, maintenance employees, and truck drivers" and expressly excluding "all other employees." This proposed Stipulated Election Agreement prepared by the Regional Office made no reference to a "wall-to-wall" or "plant-wide" unit or otherwise put the Employer on notice that the Petitioner sought a unit containing any employee classifications other than "production employees, including maintenance and Truck drivers," as requested in the Petition.

At the outset of the hearing, the Hearing Officer sought the Parties' positions as to the total number of employees in the petitioned-for unit. The Parties' positions revealed a discrepancy of approximately 19 employees (Tr. 19). The Employer — on the record — tabulated the number of employees in each of the three petitioned-for departments (production, maintenance, and truck drivers) in an effort to address the discrepancy (Tr. 22). Rather than do the same, Counsel for the Petitioner declared that addressing the discrepancy "doesn't matter" and was a "waste of time" (Tr. 22). Counsel for the Petitioner, in fact, agreed that the Parties were "talking about the same employees" and agreed with the Hearing Officer that "[t]here's nothing else to litigate" other than the issue of "whether or not there should be one unit including production and maintenance employees and the truck drivers or two units, one including the production and maintenance employees and another including the truck drivers" (Tr. 21-23).

Thus, the hearing commenced with the Employer consistently maintaining its position that the petitioned-for unit of "production employees including maintenance and Truck drivers" was inappropriate, but that two separate units, one for production and maintenance employees and the other for truck drivers, was appropriate. The Employer never addressed the issue of shipping employees because the Petition did not reference them and the Employer did not seek to include them.

It ultimately came to light at the hearing that the Petitioner errantly believed that shipping employees were the same as "production employees" and that, by only listing "production employees, maintenance, and Truck drivers" in its Petition, the Petitioner excluded shipping employees from the petitioned-for unit.

After the Petitioner's error came to light, the Petitioner never raised the issue of amending the Petition to include shipping employees. The Employer stated that, should the Petitioner seek to amend the Petition at hearing, the Employer would be would be prejudiced unless it received additional time to adequately prepare and respond to an amended Petition (Tr. 71, 86, 94). However, neither the Petitioner nor the Hearing Officer suggested amending the Petition. Instead, the Petitioner's singular concern was completing the hearing expeditiously so that a decision and direction of election could issue without delay (Tr. 64, 94).

After fully hearing both the Petitioner's and the Employer's positions on the issue, the Hearing Officer consulted with the Regional Director to determine the appropriate course of action (Tr. 95). Neither the Employer nor the Petitioner was party to this conversation. As conveyed by the Hearing Officer, the Regional Director correctly decided that the inclusion of "shipping employees [] constitute [a] unit inclusion issue, and that [] the Regional Director is going to defer making a ruling on or addressing until after the election" (Tr. 95). The Hearing

Officer announced that the Regional Director had decided that "it has to do with a particular department not being as petitioned for, the production department, which as the petition states includes maintenance and truck drivers. So this is [a] unit inclusion issue versus scope. So the Regional Director is deferring making a decision as to the shipping employees during this proceeding" (Tr. 95-96).

The Regional Director, therefore, correctly did not decide that the Petition should be amended at the time to include shipping employees. Neither party thereafter objected to the Regional Director's decision nor expressed any confusion about the Hearing Officer's explanation of that decision. Indeed, the Regional Director's decision served the interests of both Parties by allowing the hearing to continue without delay or prejudice to either Party, while preserving the rights of both Parties to litigate the inclusion of shipping employees in the petitioned-for unit after the election.

At the express request of the Hearing Officer, the Employer then presented an organizational chart that clearly showed that shipping and production were separate departments (Tr. 98-102). Nevertheless, the Hearing Officer/Regional Director did not reverse or in any way revisit the Regional Director's ruling. The Petitioner, represented by experienced counsel, also did not seek to reverse or revisit the Hearing Officer/Regional Director's ruling that the issue of including of the shipping employees in the petitioned-for unit was to be deferred and not litigated, even after the Employer's organizational chart was read into evidence by the Hearing Officer, and it became fully aware that Production and Shipping were separate departments (Tr. 98-102).

Based on the Hearing Officer/Regional Director's ruling regarding shipping employees, the Parties proceeded by presenting evidence (witnesses and documents) and oral arguments

solely on the issue of whether truck drivers share a community of interest with production and maintenance employees, based on the unit as described in the Petition. Even though the Petitioner had at least one shipping employee present for the entire hearing, the Petitioner did not call him to testify. Based on the Regional Director's decision to defer the issue until after the election, the Parties expressly did not argue their respective positions about the inclusion/ exclusion of shipping employees.

Any testimony regarding shipping employees was raised only to the extent the Petitioner's witnesses repeatedly confused and misidentified shipping employees as production employees (Tr. 220-24, 230-35). The Employer also promptly objected when Counsel for the Petitioner's line of questioning of the Employer's Fleet Manager crossed into issues related to the purported commonalities between shipping employees and employees in the petitioned-for unit (Tr. 179). Counsel for the Petitioner did not challenge the Employer's objection and agreed to "move on" (Tr. 179). The Hearing Officer, thus, did not rule on the Employer's objection, but ruled that "[w]e're not litigating the shipping employees," to which both Parties expressed their understanding (Tr. 180). Indeed, Counsel for the Petitioner confirmed that he was "not talking about shipping employees" and that "I'm going to focus on [over-the-road] truck drivers and hostlers" (*Id.*).

The hearing concluded with the Parties having presented evidence solely on the issue of whether the petitioned-for unit was inappropriate and whether the classifications sought if separated into two units, production and maintenance in one, and truck drivers in the other would constitute appropriate units. At no point did the Petitioner, though represented by counsel, present any evidence showing that "production employees" somehow included shipping

employees. The Petitioner also did not argue in closing that production employees included shipping employees based on any record evidence (Tr. 268-75).

II. THE EMPLOYER'S MCCLELLAN OPERATION

The Employer is in the business of the manufacturing and transport of corrugated products at its McClellan, California facility ("Facility") (DDE at 1). The Employer's workforce at McClellan consists of several individual departments, including, but not limited to, Production, Maintenance, Truck Drivers, and Shipping, each of which has its own supervisor. (*Id.*) The Employer employed approximately 104 employees in the production job classification, 12 maintenance employees, and 19 truck drivers, which includes "over-the-road" drivers and "hostlers" (Tr. 21-22).[2]

A. Production Department

The Production Department operates in two production areas of the Facility: Converting and Corrugator (DDE at 3, n.5). Production Superintendent Ignacio Maciel oversees the Production Department (DDE at 3; Tr. 26). Various production supervisors report to him (DDE at 3, n.6; Tr. 101-02). Neither Maciel nor any of the production supervisors have any authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, direct, adjust grievances, or effectively recommend such action as to any maintenance, truck driver, or shipping employees (Tr. 34-41). The Employer's Maintenance, Trucking, or Shipping department supervisors do not supervise or have any supervisory authority over production employees (Tr. 34-41, 120-131, 146-156).

[2] The Regional Director errantly identified Shipping fork lift driver and Shipping Lead Desmond Nelson as a production employee and claimed that there was "conflicting testimony" as to which department Nelson belonged (DDE at 4 n.8). The "conflicting testimony" was purely the result of the Petitioner's witnesses misidentifying Nelson as a "production" employee (Tr. 220-224, 230-235). The record evidence clearly establishes that Nelson is a shipping employee (Tr. 242).

Production employees in the Corrugator department operate a machine called a Corrugator to manufacture corrugated paper sheets, which are used by customers or the Converting Department to be converted into boxes (Tr. 26-28, 32-33). In the Conversion department, production employees use machines to convert the paper sheets into boxes, which the Employer sells to customers (Tr. 32-33). The Corrugator and Converting departments run on three shifts: 6:30 a.m. to 3:00 p.m.; 2:30 p.m. to 11:00 p.m.; and 10:30 p.m. to 7:00 a.m. (Tr. 32). Production employees do not require any special licenses or skills (Tr. 33).

Production employees have no interaction with truck drivers (Tr. 33, 145). Once the corrugated sheets or converted boxes are produced, they are transported by shipping forklift operators to the production area docks where the boxes are then loaded into trucks for transportation to the shipping warehouse or into trailers (Tr. 50-62). Thereafter, either truck drivers known as "Hostlers" transport the trailer to the truck yard located approximately 1/4 mile from the production facility or "Over-the-Road" truck drivers transport the trailers directly to customers (DDE at 5-6; Tr. 168-69, 174-75, 197-98). Production employees do not work on the production docks where trucks are loaded, in the shipping warehouse, or in the truck yard (Tr. 32-33, 174-75). Production employees do not inform truck drivers when trailers are loaded and ready for delivery (Tr. 55-57).

When Production Superintendent Maciel needs product moved from the production area, he either contacts Shipping Supervisor Machel LeRoy or Shipping Clerk Jeff Bingham[3] who, in turn, inform shipping forklift operators or truck drivers that product is ready to move (Tr. 55-57). Maciel does not direct any shipping employees or truck drivers after contacting LeRoy or Bingham (Tr. 34-41, 56-47).

[3] During the hearing and in the DDE, Bingham is errantly referred to as "Jeff Burham."

Production employees do not perform maintenance, shipping, or truck driver work, nor are they ever temporarily transferred or assigned to perform work in other departments (DDE at 6; Tr. 31, 41-43). Production employees are listed on separate seniority lists than maintenance employees, shipping employees, and truck drivers (Tr. 45-46).[4] All Production department business records are either kept in Maciel's office or with Human Resources (Tr. 45). Maciel does not maintain any shipping, maintenance, or truck driver business records in his office (*Id.*).

Production employees are required to wear a safety yellow shirt, steel-toe boots, safety glasses, and ear plugs (Tr. 44). Production employees follow the same attendance policy and Alcohol and Drug policy as maintenance employees, which are different than the attendance and DOT drug testing policies followed by truck drivers (Tr. 44, 166). All employees at the facility share the same healthcare and 401(k) plan (Tr. 177).

Production employees have their own break area, which is not used by shipping employees or truck drivers (Tr. 191-92). Production employees use a separate parking lot from truck drivers (Tr. 189).

B. Maintenance Department

Maintenance employees work throughout the entire production area in the production facility, including the Corrugator and Conversion areas (Tr. 105-06). The Maintenance department is located near the Corrugator area (Tr. 106-07).

The Maintenance Department is managed by Maintenance Manager Mikhail Rosenberg (Tr. 105). As the Regional Director found, there is no evidence that Rosenburg supervises the truck drivers (DDE at 3). Indeed, Rosenberg does not have decision-making authority with

[4] While one shipping employee, Reginald Narayan, was errantly included on the production employee seniority list, the Employer clarified that this was due to an administrative coding error and that the employee should not have been included on the list. Indeed, no other shipping employees were on the production employee seniority list (Tr. 103-04).

respect to any supervisory functions (hiring, firing, discipline, discharge, *etc.*) of any employees other than maintenance employees (Tr. 120-131, 133-35). The Employer's Production, Trucking, or Shipping department supervisors do not supervise or have any supervisory authority over maintenance employees (Tr. 120-131).

Maintenance workers are responsible for maintaining production machines (Tr. 105-06). They do not perform maintenance on the trucks driven by truck drivers (Tr. 108). The job titles within the Maintenance Department include: maintenance lead, combining tech, fabricating technician, water treatment technician, and parts clerk (Tr. 106). Maintenance employees have fixed work shifts and schedules, which are different from truck drivers (Tr. 114-15). Maintenance workers are required to have a high school diploma and they participate in specialized training programs hosted by the Employer, but do not require any special licenses (Tr. 117-19).

Maintenance employees have no interaction with truck drivers and there is no evidence of any interactions with shipping employees (Tr. 119-20, 145). Maintenance employees do not perform the same work as truck drivers or shipping employees, transfer between Trucking or Shipping departments, or have interchange with those departments (Tr. 120-23). Maintenance employees are listed on separate seniority lists from production and shipping employees, and truck drivers (Tr. 135-36). All Maintenance Department business records are either kept in Maintenance Manager Rosenburg's office or with Human Resources (Tr. 135). Rosenburg does not maintain any shipping, production, or truck driver business records in his office (*Id.*).

Maintenance workers do not share tools or equipment with truck drivers (Tr. 115-17). Their uniforms consist of fire-rated uniforms, helmets, and steel-toe boots, which are not worn by truck drivers (Tr. 133). Maintenance employees follow the same attendance policy and

Alcohol and Drug policy as production employees, which are different than the attendance and DOT drug testing policies followed by truck drivers (Tr. 133-135).

C. Truck Drivers

The Trucking Department is located in the truck yard, which is about 1/4 mile from the Production Department (Tr. 168-69, 174-75, 197-98).

Fleet Manager Tricia Lbayan manages the Trucking Department (Tr. 139-40). Lbayan does not supervise production or maintenance employees (Tr. 140, 146-56), and the Regional Director found no evidence that she supervises shipping employees (DDE at 5). Indeed, Lbayan does not have decision-making authority with respect to any supervisory functions (hiring, firing, discipline, discharge, *etc.*) of any employees other than those in the Trucking Department (Tr. 146-56). The Employer's Production, Maintenance, or Shipping department supervisors do not supervise or have any supervisory authority over Trucking Department employees (Tr. 34-41, 120-31, 146-156).

Lbayan supervises Dispatcher Vincent Rios, who is responsible for the day-to-day operations and assigns work duties to about 19 truck drivers: 3 Hostlers and 16 Over-the-Road drivers (Tr. 140-41). Unlike the production and maintenance employees, Over-the-Road drivers do not work set schedules (Tr. 143-44). Their work hours vary, are dependent on customer needs, and are set by Dispatcher Rios (*Id.*). Hostlers work set schedules, which are different from production and maintenance schedules (Tr. 32, 114-15, 143-44).

The Regional Director oddly ignored the evidence that truck drivers are separately governed by Boise Cascade Trucking ("BCT"), a separate entity from the Employer that is the governing body for all trucking and Department of Transportation issues within the Employer (Tr. 156-58). BCT is involved in various aspects of hiring, discipline, discharge, setting of wages, administration of random drug tests, and fleet specific safety training for the Employer's

truck drivers, as well as keeping all of the Employer's trucking records (*Id.*). BCT has the authority to discharge a driver (Tr. 157). BCT has no role with respect to production, maintenance, or shipping employees (Tr. 158).

As the Regional Director found, truck drivers do not share any job duties with production and maintenance workers (DDE at 6). Hostlers primarily use yard trucks to move trailers between the production facility and the truck yard. Hostlers move empty trailers from the truck yard to the production facility, where shipping employees load product onto the trailers, and then move those trailers to the truck yard for later delivery by Over-the-Road drivers who use commercial trucks to deliver the product to customers and other Employer facilities (Tr. 168-69, 174-75, 197-98). Over-the-Road drivers spend a majority of their days away from the production facility hauling product (DDE at 5, Tr. 144, 168-169). Over-the-Road drivers also transport raw materials from suppliers to the Facility (Tr. 168-69). Over-the-Road drivers also spend approximately 15% of their time hauling product produced at other Employer facilities (Tr. 169).

The record reflects that truck drivers do not interact, have any contact, or interchange with production or maintenance employees and have minimal contact with shipping employees (Tr. 33, 119-20, 160-61). At most, the Petitioner's witnesses testified to truck drivers having some incidental contact with two shipping employees regarding the movement or placement of trailers, and that they receive bills of lading and other delivery information from Shipping Lead Bingham approximately two times per week (Tr. 212-15, 220-224, 230-235).

Both Hostlers and Over-the Road truck drivers have different licensing requirements than other employees, as they are required to complete truck driving school and have a commercial driver's license (CDL), also known as a Class A driver's license (Tr. 145-46). The Employer

applies a different attendance policy to truck drivers than it applies to production and maintenance employees (Tr. 161-63). Truck drivers are subject to Department of Transportation (DOT) regulations, like random drug testing. Production and Maintenance employees are not subject to DOT regulations or random drug testing (Tr. 156, 165-67). Truck drivers park their personal vehicles in a separate area from the other employees (Tr. 189).

Hostlers wear green sweatshirts while Over-the-Road truck drivers wear a blue polo shirt (Tr. 161, 209, 232). Truck drivers do not use the Production Department break room and do not have their own lunch or break room (Tr. 191-92). Fleet manager Lbayan testified that, at times, truck drivers sit in the shipping building break area while they wait for their trailer to be loaded and prepared, but there is no evidence that they have contact with any shipping employees when in the area (Tr. 176-77).

D. Shipping Department

As detailed below, the Hearing Officer ruled that the parties were prohibited from presenting any evidence on the shipping employees and therefore the Employer was unable to present any evidence on (1) the lack of any community of interest between the shipping employees and the truck drivers and (2) the community of interest between shipping employees and the production and maintenance employees (Tr. 95-96, 180). However, in describing the Employer's operation, evidence was presented that Shipping Supervisor Machel LeRoy supervises the Shipping department employees, including shipping leads, clerks, and forklift operators, but did not supervise any production or maintenance employees (Tr. 53, 56, 59, 101 213).

Over-the-Road truck driver Ricky Gamble testified that an individual whom he suspected to be Shipping Supervisor Leroy "sent him on routes sometimes" (Tr. 213). Hostler Castillejos also testified that "[s]ometimes I deal with [] Mike Leroy" about where to put a trailer (Tr. 228).

The Regional Director found that "there *might* be some overlap in supervision between the shipping and trucking departments vis-à-vis Shipping Supervisor LeRoy directing the hostlers," but did not make a definitive finding that LeRoy possessed any supervisory authority over truck drivers (DDE at 8) (emphasis added). Although the Regional Director found that Shipping Lead/Clerk Bingham "instructs hostlers where to place and move trailers," Bingham in fact is not a supervisor (Tr. 56). The Employer's Production, Maintenance, and Trucking departments do not supervise or have any supervisory authority over shipping employees (Tr. 34-41, 120-131 146-156).

Because of the Hearing Officer/Regional Director's directive that the parties were not to litigate the issue of the unit placement of the shipping employees (Tr. 95-96, 180), the record is not surprisingly devoid of evidence regarding shipping employees' specific skills and training and terms and conditions of employment. Although at least one shipping employee was present throughout the hearing, neither Party called him to testify. Thus, the only evidence of shipping employees' duties, integration, contact, and levels of common supervision with other employees was provided third-hand during questioning of the Party's witnesses as it related to the alleged commonalities between truck drivers and production and maintenance employees.

The record testimony indicated that shipping employees work on the production docks and in a separate shipping warehouse (Tr. 51-54, 206-07, 215-16). Shipping forklift operators load trailers or vans at the production dock, where Hostlers move the trailers to the shipping warehouse or truck yard, or where Over-the-Road drivers transport the product to clients (Tr. 51-54, 168-69, 174-75, 197-98).

Shipping employees have a separate break area from production and maintenance employees (Tr. 191-92). While there was testimony that truck drivers sometimes sit in the

shipping break area while they wait for their trailer to be loaded and prepared for hook-up, there is no evidence that truck drivers have any contact with shipping employees when in the area (*Id.*).

III. THE REGIONAL DIRECTOR'S ORDER APPROVING AMENDMENT TO PETITION AND ORDER TO SHOW CAUSE

On October 18, 2019, despite neither Party moving to amend the Petition and the Regional Director having correctly deferred the issue of the inclusion of shipping employees until after the election without objection, the Regional Director *sua sponte* "approved the Petitioner's request to amend the Petition's unit description to seek an election among a wall-to-wall unit of full-time and part-time production and maintenance employees, shipping employees and truck drivers; excluding all temporary employees, guards, and supervisors as defined by the Act." ("Amendment"). The Regional Director ordered that either Party show written cause as to why she should reopen the record and permit additional litigation regarding the appropriateness of the petitioned-for unit, as amended, and "include legal argument and an offer of proof as to what additional specific evidence, if any, the moving party would introduce at hearing and its relevance under extant law" (*Id.*)

The Regional Director based her decision to amend the Petition on a number of incorrect factual determinations, most notably (1) that the Employer somehow kept "mum" about the Petitioner's failure to include Shipping employees in the Petition — despite the Employer's attempts to rectify the discrepancies in the Parties' calculations of the number of employees in the petitioned-for unit; (2) that her initial decision was somehow "confusing" and required "clarification," despite neither Party objecting to or expressing confusion about her ruling; and (3) that the Parties "continued to argue their respective points about the inclusion/exclusion of those [Shipping] employees" after the Regional Director correctly decided to defer the issue until

after the election (*Id.*) As discussed above, the Parties and Hearing Officer proceeded under the express understanding that the Parties were not to litigate the shipping employee issue (Tr. 95-96, 180). Thus, none of the evidence presented at hearing related to or was probative of whether shipping employees should be included in the petitioned-for unit.

The Regional Director also noted that "permitting the amendment reduces the need for litigation because the plant-wide unit is presumptively appropriate," but did not address whether shipping employees had a sufficient community of interest with the petitioned-for unit to support the presumption. Instead, the Regional Director put the onus on the Parties to present an "offer of proof as to what additional specific evidence, if any, the moving party would introduce at hearing," despite neither Party requesting nor expressing any desire to amend the petition or reopen the hearing (*Id.* at 6).

On October 25, 2019, the Employer filed its Reply to Regional Director's Order Approving Amendment to Petition and Order to Show Cause ("Reply"). The Employer cited to the Parties' arguments and the Regional Director's/ Hearing Officer's rulings on the record, which refuted the Regional Director's errant factual findings in the Amendment. The Employer also refuted the Regional Director's legal analysis regarding the presumptive appropriateness of a plant-wide unit and cited Board law holding that the presumption does not totally obviate a showing that the employees sought to be included in the unit have a sufficient community of interest and that, although the Petitioner's desire is a factor, it is not a controlling factor (*Id.* at 5-6).

The Employer therefore requested that the Regional Director sustain the Hearing Officer/Regional Director's ruling denying the amendment to the Petition, find that the petitioned-for combined unit of production and maintenance employees plus truck drivers share

little if any community of interest and therefore is inappropriate, and (1) direct an election in two separate voting units, with production and maintenance employees in one, and truck drivers in another; and (2) consistent with the Hearing Officer/Regional Director's ruling, defer the issue of including shipping employees in the petitioned-for unit until after the election (*Id.*)

IV. THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Based on the Regional Director's erroneous factual findings and Amendment, on November 1, 2019, she issued her DDE, amending the Petition over the Employer's objections to include shipping employees, and directing an election among a collective bargaining unit of "[a]ll full-time and regular part-time employees employed at the Employer's McClellan Facility in the Trucking, Production, Maintenance, and Shipping Departments; excluding all temporary employees, guards, and supervisors as defined by the Act" (DDE at 10) The Regional Director ordered that the election be held on November 7, 2019 from 5:00 a.m.- 7:30 a.m.; 2:00 p.m.-3:30 p.m.; and 5:30 p.m.-6:30 p.m. in the Corrugator Conference Room at the Facility (*Id.*)

The Regional Director acknowledged that the Petitioner did not "articulate[] its desire to amend the Petition in the form of a formal request or motion," but nevertheless determined that the Petitioner's mere clarification on the record that it sought a wall-to-wall unit was sufficient for the Regional Director to decide *sua sponte* to include shipping employees in the unit (*Id.* at 2, n.4). Indeed, the Regional Director misstated the record to claim that the Petitioner's purported clarification "resulted in Employer counsel acknowledging Petitioner's desire for an amendment, objecting thereto, the Hearing Officer seeking my approval for the amendment, and her informing the parties thereof before the lunch break" (*Id.*). In fact, counsel for the Employer merely stated that it would object *should* Petitioner seek such an amendment (Tr. 71). The Petitioner did not seek an amendment.

The Regional Director nonetheless found that the "wall-to-wall" unit of production, maintenance, shipping, and truck drivers that she created was a presumptively appropriate unit despite (1) the Parties and Hearing Officer acknowledging that the Parties were not to litigate whether shipping employees shared a community interest with the petitioned-for unit, thus none of the elicited record testimony being probative of that issue; (2) the Regional Director not expressly finding that shipping employees share a sufficient community of interest with production employees, maintenance employees, or truck drivers; and (3) the Regional Director not expressly finding that truck drivers share a sufficient community of interest with production employees, maintenance employees, or shipping employees.

Moreover, despite the Employer not raising the argument, the Regional Director rejected directing an election that would result in a "residual" unit of 12 shipping employees (DDE at 8). The Regional Director then disregarded the numerous distinct interests of truck drivers and focused on the handful of common interests with shipping employees that were vaguely alluded to at hearing to find that the inclusion of truck drivers with production, maintenance, and shipping employees compromised *an* appropriate unit (DDE at 8-9).

V. THE EMPLOYER'S NOTICE OF WRONG ELIGIBILITY DATE AND REQUEST FOR POSTPONEMENT TO ALLOW SUFFICIENT TIME TO POST THE CORRECT NOTICE OF ELECTION

The Employer's last payroll period end date preceding the DDE was Sunday, October 27, 2019. However, the Regional Director provided in the DDE that "[e]ligible to vote are those in the unit who were employed during the payroll period ending September 22, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off" (*Id.* at 10) (emphasis added). The Regional Director also provided a Notice of Election and ordered that, pursuant to Section 102.67(k) of the Board's rules, the Employer post for three (3) full working days prior to 12:01 a.m. of the day of the election copies of the

Notice and distribute the Notice electronically to employees with whom it customarily communicates electronically. The Notice describes the "Employees Eligible to Vote" as "[a]ll full-time and regular part-time employees employed at the Employer's McClellan Facility in the Trucking, Production, Maintenance, and Shipping Departments who were employed by the Employer during the payroll period ending September 22, 2019."

On November 5, 2019, the Employer filed with the Region a Notice of Wrong Eligibility Date and Request for the Regional Director to Withdraw and Reissue the Direction of Election and Election Notice. ("Notice") The Employer notified the Regional Director that she had provided the wrong eligibility in the DDE and Notice of Election, and thus requested that the Regional Director (1) withdraw the current DDE containing the wrong eligibility date of September 22, 2019 and issue a new Direction of Election with the correct eligibility date; (2) withdraw the current Notice of Election and issue a new Notice of Election containing the correct eligibility date; and (3) postpone the election scheduled for November 7, 2019 and direct an election for an appropriate date that will provide the Employer three (3) full working days prior to 12:01 a.m. of the day of the election date to post and distribute the revised Notice of Election (Notice at 2-3). The Employer noted the Board's policies and procedures underlying the three day notice period and the likely disenfranchisement and confusion among voters should the election proceed as scheduled in light of the wrong eligibility date being used (*Id.*).

The Employer timely filed its Voter List on November 5, 2019, which did not include two employees hired or working after the eligibility cutoff of September 22, 2019, as provided in the DDE and Notice.

Nonetheless, at 5:49 p.m. Pacific time on November 6, 2019 (less than 12 hours before voting was to begin), the Regional Director issued an Errata to the Decision and Direction of

Election and revised the Notice of Election ("Errata") with the corrected voter eligibility date of October 27, 2019. The Regional Director advised that the Employer "[p]lease post the Errata and corrected Notice of Election on bulletin boards and other conspicuous places in areas where the employees in the bargaining unit work. To help avoid an issue about the adequacy of the posting period, the notices should be posted immediately upon receipt."

Less than an hour after receiving the Errata and revised Notice, the Company emailed the Secretary to Assistant Director, informing her that no manager or agent authorized to post the Notice was at the Facility after 5:00 p.m. and that "without some clarification or communication concerning the issuance and posting of a revised notice, the last minute correction is . . . without impact." The Regional Director did not respond. The Employer was unable to post the Revised Notice until less than one hour before the first scheduled voting session at 5:00 a.m. Pacific time on November 7, 2019.

Not surprisingly, given the confusion, only 126 out of 160 eligible voters actually voted, less than 50% of all eligible voters (66/160) voted for the Petitioner, and while the Petitioner received a slight majority of the votes cast (66-60) a swing of just three votes would have resulted in the Petitioner receiving less than a majority of even the valid votes cast.

STANDARD OF REVIEW

Pursuant to Section 102.67(d) of the Board's Rules and Regulations, a request for review of a DDE may be granted, *inter alia*, upon the following grounds:

Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d).

ARGUMENT

I. THE REGIONAL DIRECTOR DEPRIVED THE EMPLOYER OF DUE PROCESS BY UNILATERALLY AMENDING THE PETITION AFTER THE CLOSE OF HEARING

By her Amendment, the Regional Director trampled on the Employer's rights to due process or any meaningful opportunity to challenge the appropriateness of the amended unit in contravention of Board policy.

The Board's own guidance expressly addresses the prejudicial impact caused by an amendment to a petition. Specifically, the guidance provides that "[i]f the amendment sought is substantial, *e.g.*, a material enlargement or a change in the scope of the unit, exercise the greatest care to see that the granting of the amendment and proceeding **with the hearing will cause no prejudice to any interested persons or organizations**. *NLRB Guide for Hearing Officer's in NLRB Representation and Section 10(K) Proceedings*, at p. 30. The Regional Director's *sua sponte* Amendment of the Petition after the hearing closed contravened this established Board procedure and deprived the Employer of due process, resulting in significant prejudice to the Employer.

Indeed, the Regional Director, on her own accord, materially enlarged and changed the scope of the unit by adding an entire classification of employees employed in a distinct,

separately-supervised department only after the Employer and the Petitioner fully presented their evidence (witnesses and exhibits) and oral argument and despite the Regional Director's and Hearing Officer's rulings that the Parties were not litigating the inclusion of shipping employees during the hearing. In reliance of the Hearing Officer/Regional Director's ruling that the issue of inclusion of the shipping department employees was to be deferred and not litigated, the Employer presented evidence, responded to the evidence presented by the Petitioner, and provided oral argument exclusively on the issue as to whether the truck drivers at issue shared a sufficient community of interest with production and maintenance employees and whether production and maintenance employees, combined with truck drivers, was an appropriate unit. Based on the Hearing Officer's and Regional Director's ruling that the Parties were not to litigate the unit inclusion of the shipping employees, the Employer did not — and could not — address the inclusion of shipping employees or any presumptive appropriateness of a wall-to-wall single facility unit. Put another way, based on the Hearing Officer/Regional Director's ruling that the Parties were not to litigate the unit inclusion of the shipping employees, there was no reason for the Employer to address the inclusion of shipping employees or any presumptive appropriateness of a wall-to-wall single facility unit.

Thus, by the Regional Director's *sua sponte* post-hearing Amendment, the Employer was deprived of any opportunity to prepare or present its own case as to the appropriateness of including shipping employees in the petitioned-for unit, or to cross-examine the Petitioner's witnesses on evidence the Regional Director decided after the close of the hearing would be considered probative of shipping employees' communities of interest with production employees, maintenance employees, and truck drivers. The Regional Director deprived the Employer of these opportunities despite the fact that, pursuant to the Hearing Officer/Regional

Director's ruling, the issue was not litigated and the Employer was not permitted to adduce any evidence regarding the issue. In fact, any attempt by the Employer to litigate the inclusion of shipping employees in the unit at the hearing would have prolonged the hearing, certainly to the chagrin of the Petitioner whose singular desire was for an expedited hearing and quick election (Tr. 64, 94).

While the Regional Director purported to provide the Employer with an opportunity to show cause as to why she should reopen the record and permit additional litigation regarding the appropriateness of the petitioned-for unit, as amended, including "legal argument and an offer of proof as to what additional specific evidence, if any, the moving party would introduce at hearing," the Regional Director ignores that *neither* Party expressed any desire to amend the Petition or reopen the hearing. The Regional Director then faults the Employer for "not specify[ing] which community-of-interest factors it believes weigh in favor of, or against, exclusion; much less with any specificity as to the additional evidence it would introduce." (DDE at 2). According to the Regional Director, the Employer should have expended the time and resources necessary to investigate and essentially litigate the issue after the close of hearing and before the election in the off-chance that the Regional Director would take it upon herself to amend the petition and demand the Employer provide "additional, specific evidence" it would show should the Regional Director reopen the hearing. Having no desire to reopen the hearing, the Employer argued that the Regional Director should simply follow the ruling she issued at hearing, to which neither Party objected nor expressed any confusion about whatsoever.

The Regional Director also faults the Employer for "not tak[ing] the position that a wall-to-wall unit is inappropriate" (DDE at 7), ignoring that the Employer in its Reply *did*, in fact, refute the Regional Director's legal analysis regarding the presumptive appropriateness of a

plant-wide unit and cited Board law holding although a wall-to-wall unit is *presumptively* appropriate it must nevertheless be established that the employees sought to be included have at least a sufficient community of interest to be included in a single unit and that the failure to do so would rebut the presumption (Reply at 5-6). Thus, the Employer argued that the Amendment was improper because, based on the Hearing Officer/Regional Director's ruling at hearing, the Parties did not litigate the appropriateness of including shipping employees in the petitioned-for unit (*Id.*)

The Regional Director also misconstrued the Employer's argument to claim that the Employer claimed prejudice due to "unsubstantiated need for more time to prepare to litigate the asserted disparate interests of the drivers at issue herein" (DDE at 7). In fact, the Employer was clear at hearing that it would be prejudiced by being forced to litigate the issue of whether shipping employees shared a community of interest with the petitioned-for unit given the Employer had merely found out that morning that the Petitioner sought to include shipping employees in the unit (Tr. 71, 94). Thus, the Employer was clear in its Reply that the Hearing Officer/Regional Director's ruling deferring the issue of including shipping employees best effectuated the Board's policy for an expeditious election, a policy that both the Hearing Officer and the Petitioner advocated for on several occasions throughout the hearing, while at the same time preventing prejudice to the Employer by being forced to litigate at the hearing a different unit than what the Petitioner had petitioned-for.

The prejudice to the Employer was fully realized when, based on Regional Director's *sua sponte* Amendment, the Regional Director in her DDE proceeded to cherry-pick the wholly undeveloped and uncorroborated testimony regarding the purported commonalities between shipping employees and the other petitioned-for employee classifications unit merely to reach the

conclusion that the purported wall-to-wall unit the Petitioner failed to seek, but which was necessary to for the Regional Director to direct an election without further delay, was an appropriate unit.

What is clear is that, in her effort to expedite the processing of this matter perhaps as a result of the current Representation case rules and time targets, the Regional Director abused her discretion by depriving the Employer of its right to: (1) sufficiently analyze the appropriateness of the inclusion of shipping employees in the unit; (2) present any evidence contradicting the cherry-picked evidence cited by the Regional Director; or (3) otherwise present its case on the merits of including shipping employees in the unit. The Regional Director's zeal for an expeditious election, however, deprived the Employer of due process and cannot be endorsed by the Board as consistent with Board policies or the purposes of the Act.

II. THE REGIONAL DIRECTOR UNIT MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED BOARD PRECEDENT IN FINDING THE AMENDED UNIT APPROPRIATE

A. Community of Interest Factors Must Be Considered Notwithstanding The Presumption

By unilaterally amending the Petition to include shipping employees, the Regional Director gave undue weight to the "presumptive appropriateness" of the "plant-wide" unit she created. Although Board precedent does state that a plant-wide unit is presumptively appropriate, it makes clear that, if the presumption is challenged, it must be established that the employees sought to be included in the unit have a sufficient community of interest to support that the presumption is applicable. The presumption is rebuttable. Although a petitioner's desire is a factor, it is not (and under Section 9(c)(5) of the National Labor Relations Act cannot be) a controlling factor. The DDE deviated from well-established Board precedent by making the

presumptive appropriateness of a wall-to-wall unit irrebutable and not permitting the Employer to present evidence to rebut the presumption.

In *Airco Inc.*, 273 NLRB 338 (1984), the Board stated "[w]e disavow the statement in *Keystone Pretzel Bakery* (citations omitted) that the placement of truck drivers in a production and maintenance unit 'depend(s) largely upon the wishes of the petitioning union' and found that the correct standard was set forth in *Marks Oxygen,* 147 NLRB 228 (1964), which held that notwithstanding the presumption, a sufficient community of interest nevertheless must be established in order to include a distinct group of employees in a plant-wide unit."

In determining whether there is a sufficient community interest the Board considers a number of factors, such as whether the employees:

(1) are organized into a separate department;

(2) have distinct skills and training;

(3) have distinct job functions and perform distinct work;

(4) are functionally integrated with other employees;

(5) have frequent contact with other employees;

(6) interchange with other employees;

(7) have distinct terms and conditions of employment; and

(8) are separately supervised.

Id. (citing *United Operations*, 338 NLRB 123 (2002); *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004)). The applicability of each of the factors must be considered before a determination can be made as to whether the requested unit falls within the presumption. And the Employer *must* be given the opportunity to address each factor in order to rebut the presumption.

Further, there must be an analysis of the factors to determine whether the duties of the truck drivers are sufficiently distinct from the remainder of the proposed unit as to warrant a separate unit of truck drivers. That is, do the employees "have meaningfully distinct interest in the context of collective bargaining that outweigh similarities." *The Boeing Co.* 368 NLRB No. 67 (2019) (citing *Constellation Brands, U.S. Operations Inc.*, 842 F.3d 784, 794 (2d Cir. 2016)). It is insufficient to merely conclude that the shipping employees or truck drivers have some common interests with the other employees; there must be an analysis of "both the shared and *distinct* interests" of the employees at issue. *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) (emphasis added).

Thus, if it is challenged, the presumption does not relieve the Board of its obligation under Section 9(b) of the Act to determine the appropriate bargaining unit "in each case" in order to guarantee employees "the fullest freedom" in exercising their Section 7 rights. *Id.* at 6. Thus, the Board must present the Employer the opportunity to present evidence to rebut a presumptively appropriate unit and the Regional Director's failure to provide the Employer any opportunity to present evidence to rebut the presumption here was an abuse of the Regional Director's discretion and must be found to constitute reversible error.

Indeed, the Regional Director's reliance on the undeveloped record evidence regarding the interests of shipping employees and her disregarding the distinct interest of the truck drivers falls far short of conforming to the Board's requirements. The Regional Director here erroneously applied Board law by presuming that the expanded unit was appropriate without permitting the Employer the opportunity to rebut the presumption. Furthermore, the Regional Director's arbitrary and wholly prejudicial ruling improperly placed the onus on the Employer to rebut the purported wall-to-wall unit despite the issue being beyond the scope of the hearing and

without the Petitioner first showing, or the Regional Director first finding, that the petitioned-for unit (either as amended or otherwise) shared a community of interest. The DDE thus effectively accorded controlling weight to the extent of union organization which Section 9(c)(5) expressly prohibits. *See Boeing Co.* 368 NLRB at *1; *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1993).

If the Regional Director instead had examined the question of whether the Petitioner met its burden first, as required by existing Board precedent, she would have discovered that the amended petitioned-for unit, in fact, does not meet that test. Rather, only the units proposed by the Employer are appropriate under the Board's precedent.

B. The Employees In The Recommended Unit Do Not Share A Community Of Interest

As discussed *supra*, the Employer has not been provided sufficient opportunity to show that shipping employees do not have an adequate community of interest with the petitioned-for unit, including truck drivers, or are so disparate from the petitioned-for unit such that the presumption is not even applicable. Nonetheless, the record evidence does not support to the Regional Director's findings. In *Boeing*, the Board set forth a clarifying, three-step analysis for determining whether a petitioned-for unit is appropriate. Under that analysis, the Board will consider (1) whether the members of the petitioned-for unit share a community of interest with each other, (2) whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members, and (3) guidelines the Board has established for appropriate unit configurations in specific industries. *Boeing Co.* 368 NLRB at *1.

Here, the dearth of any meaningful commonalities between production and maintenance employees, on the one hand, and truck drivers on the other should have rendered the petitioned-

for unit inappropriate. The Regional Director conceded as much with her *sua sponte* Amendment, which brought in another job classification for the sole purpose of using the presumption as a rationale to cherry-pick shared interests from the incomplete and undeveloped record evidence. Nonetheless, even assuming the evidence at hearing was somehow probative of shipping employees' shared interests with the petitioned-for unit — despite the Hearing Officer/ Regional Director's rulings that it was not — the evidence mandates that the recommended unit must be found inappropriate.

Neither the petitioned-for unit, which did not include shipping employees, nor the recommended unit, which includes shipping employees, appropriately includes truck drivers. Even assuming shipping employees share a sufficient community of interest with production and maintenance employees, the shipping employees cross classifications and departmental lines with truck drivers, report to different supervisors than truck drivers, primarily work in different parts of the facility than truck drivers, and ultimately engage in entirely different tasks in the production process than truck drivers. There is simply nothing that easily binds the employees in either the petitioned-for or amended units together with truck drivers.

Indeed, "except in situations where there is prior bargaining history," which there is not here:

> the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. As the Board has recognized. "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination."

International Paper Co., 96 NLRB 295, 298 n. 7 (1951). As demonstrated below, a review of the Board's community of interest factors and principles plainly demonstrates that both the petitioned-for unit and the amended unit are inappropriate.

1. The Employees are Organized Into Separate Departments

The Regional Director glosses over this factor in her DDE. As discussed in detail above, the four classifications in the amended unit includes employees from four distinct departments (DDE at 1). There is no overall classification, department, or other subdivision that contains these four employee classifications.

2. The Employees Have Distinct Skills and Training

The Regional Director for the most part glosses over the appropriate factor of whether employees have "distinct skills and training." However, she nonetheless found that "Drivers have different licensing requirements, as they are required to complete truck driving school and have a commercial driver's license (CDL), also known as a Class A driver's license" (DDE at 6). Indeed the record shows that truck drivers have wholly distinct skills and training from production and maintenance employees (Tr. 145-46).

The record is devoid of evidence regarding the skills and training of shipping employees. The Regional Director ignores the dearth of any evidence showing that drivers have similar skills and training as shipping employees, and does not examine this factor at all. Thus, the only record evidence shows that truck drivers have distinct skills and training than employees in the amended unit.

3. The Employees Have Distinct Job Functions and Perform Distinct Work

Despite the Regional Director expressly finding that "Drivers do not share any job duties with production and maintenance workers" (DDE at 6), she ignores that the record is devoid of evidence that truck drivers and shipping employees share any job functions. This is owed in no small part to the fact that the Parties were not permitted to litigate the issue.

Nonetheless, in conclusory terms, the Regional Director states that "[s]hipping employees move and load the products onto empty trailers at the production facility loading docks, or they transport the product to the adjacent shipping warehouse. Once the Shipping employees finish loading the trailers at the docks and inform hostlers or truck drivers that trailers are fully loaded, hostlers move the trailers to the truck yard or truck drivers pick up their trailers directly at the production facility docks" (DDE at 4). This general explanation of the shipping employees' duties does not establish any shared job functions between shipping employees and production and maintenance employees, or truck drivers.

In sum, there are no common job functions or work amongst the truck drivers, and the production, maintenance, and shipping employees. Thus, it must be found that these employees have distinct job functions and work.

4. The Regional Director Overstates the Amount of Functional Integration

The Regional Director ignores that the record is devoid of evidence establishing *any* functional integration between truck drivers and production and maintenance employees. The mere fact that the product manufactured by production employees, on equipment maintained fixed and maintained by maintenance employees, eventually ends up on trucks hauled by truck drivers, does not establish that truck drivers are somehow integrated into the production process. This lack of integration between the drivers and the other petitioned-for employees presumably is what led the Regional Director *sua sponte* to include shipping employees in the unit post-hearing because, without the shipping employees, no community of interest could be established between the drivers and the petitioned-for production and maintenance employees.

Nevertheless, and given the Hearing Officer/ Regional Director ruled that the Parties were not to adduce evidence whether shipping employees should be included in the unit (Tr. 95-

96, 180), the Regional Director overstates the record to reach her conclusion that shipping employees create the requisite functional integration among the employees in the amended unit to render it appropriate (DDE at 7-8). Indeed, without providing any citation to the record, the Regional Director concludes that "[a]s the record reflects, that seamless integration necessarily results in, or derives from, constant and regular interaction among and between all four departments. There is also evidence of interchange between shipping and production employees, as the Employer's witnesses testified" (*Id.*).

Yet the record evidence — as thin and non-probative of the issues as it is with respect to shipping employees — merely consists of testimony from *non-shipping* employees and *non-shipping* managers describing incidental contact with shipping employees and otherwise noting that shipping forklift drivers move and load product into trailers upon completion of the production process (Tr. 51-52). While this testimony generally describes shipping employees' role in the functioning of the Facility's operations, it does not establish the level of functional integration required to establish shipping employees' community of interest with production or maintenance employees, let alone truck drivers.

Truck drivers are not involved in the production process itself. While truck drivers are responsible for transporting product to customers and other sites, this is not dispositive. *See, e.g., Custom Bent Glass Co., et al.*, No. 6-CA-21537-1, 1990 WL 1222178 (Jan. 12, 1990) ("[T]he Board has routinely excluded over-the-road truck drivers from production and maintenance bargaining units because such employees are compensated on a different basis than plant workers, spend little or no time at the plant, and have little or no community of interest with plant employees.") (citing cases); *In the Matter of Puritan Mills*, 65 NLRB 962, 963–64 (1946) (Because their duties and interests differ substantially from those of employees directly

engaged in production and maintenance work, we shall exclude truck drivers from the bargaining unit.").

Moreover, the record shows that Over-the-Road truck drivers spend a majority of their time away from the Facility and, in fact, spend approximately 15% of their time transporting product that was not produced at the Facility (Tr. 169). The evidence does not show that truck drivers are fully integrated into the production process at the Facility, other than the undeveloped evidence that truck drivers transport product that is moved and loaded into trailers by shipping employees upon completion of the production process (Tr. 168-69, 174-75, 197-98). Thus, there is not sufficient evidence to establish functional integration among the employees.

In light of the underdeveloped evidence on this factor, the Regional Director's reliance on it in finding unit appropriate, based entirely on her *sua sponte* Amendment of the unit to include shipping employees, is inexplicable.

5. The Regional Director Misconstrues Evidence to Find Frequent Contact Between Truck Drivers and the Expanded Unit

The Regional Director, again without citation to the record, errantly found that "Drivers frequently interact and have contact with Production, Maintenance, and Shipping employees at the production facility" (DDE at 5). In fact, the testimony at hearing clearly established that truck drivers have no contact whatsoever with production and maintenance employees, the largest employee groups in the proposed unit (Tr. 33, 43-44, 119-20, 133, 145-46, 160-61). Nevertheless, the Regional Director cherry-picks undeveloped record testimony to find "frequent interaction" between shipping employees and truck drivers in order to support her unit determination.

Indeed, while Production Manager Maciel testified that he, at times, contacts a Shipping Lead when he needs a Hostler to move product and that the Shipping Lead relays to Hostlers

when a truckload of product needs to be moved (Tr. 55), the other testimony relied upon by the Regional Director fails to show anything amounting to frequent contact — to the extent it is probative of the issue at all. The only evidence elicited on these points derived from Petitioner's witnesses, Over-the-Road truck driver Ricky Gamble and Hostler Francis Castillejos, both of whom repeatedly mistook production employees for shipping employees (Tr. 220-224, 230-235). Nonetheless, these witnesses vaguely testified to their purported interactions with at most, three shipping department employees, Desmond Nelson, Molly Shelton, and an unnamed employee in the Shipping Office who provides bills of lading (Tr. 212-15, 220-224, 230-235). Because the Hearing Officer and Regional Director ruled that the Parties were not to litigate the unit inclusion of shipping employees (Tr. 95-96, 180), the Employer could not cross-examine these witnesses on the extent of their purported contacts with shipping employees, but only questioned them to clarify to which department these employees belonged.

The evidence solicited hardly established "frequent" contact between shipping employees and truck drivers, let alone with production and maintenance employees. In fact, the Regional Director tacitly acknowledges the minimal evidence of contact, noting that "truck drivers' interaction with the shipping and production employees appears to be limited to when they retrieve trailers and bills of lading directly from the production facility" (DDE at 7).[5]

Moreover, despite the Regional Director correctly finding that "truck drivers spend much of their day away from the production facility," she concluded without any record support that they "often" go to the production facility to determine if their trailer is fully loaded and ready for delivery (*Id.*). The testimony merely indicated that truck drivers are sometimes on the

[5] As discussed above, the Regional Director misconstrues the facts as there is no evidence that truck drivers interact with production employees when the drivers retrieve trailers and bills of lading.

production area's loading docks — not in the production areas itself — and do not interact with any production employees while on the docks (Tr. 32-33, 50-62, 145). At most, the Petitioner's witnesses testified to incidental contact with three shipping employees (Tr. 212-15, 220-224, 230-235).

While the Regional Director also correctly found that "truck drivers do not use the Production Department break room" (DDE at 5), she ignored that truck drivers do not have a lunch or break room at all. Instead, she overstated the record evidence to find that "they *often* sit in the break area located in the Shipping building while they wait for their trailer to be loaded and prepared for hook-up," as evidence of "frequent" contact with shipping employees (DDE, at 5). Indeed, the record is devoid of any evidence of how often or for how long truck drivers may be in the shipping break area at any given time or the extent of any contact they may have with shipping employees when in the area, if any.

The Regional Director also ignored that truck drivers do not have meetings with production, maintenance or shipping employees and did not point to any other evidence of contact between the groups (Tr. 160). Given the evidence that the majority of the employees in the included unit (production and maintenance) have virtually no contact or interchange with truck drivers, the Regional Director's conclusion that the truck drivers "frequently interact and have contact with Production, Maintenance, and Shipping employees" (DDE at 5), is wholly unsupported by the record. The only work contact issue that the parties were permitted to litigate was the extent of work contact between the drivers, on the one hand, and the production and maintenance employees on the other hand, and the record evidence showed virtually no work contact whatsoever between those two groups (Tr. 33, 43-44, 119-20, 133, 145-46, 160-61). Thus, the record evidence does not support the Regional Director's findings on this factor.

6. There is No Meaningful Interchange Between Truck Drivers and the Expanded Unit

The Regional Director misstates the record evidence to find that "there is also evidence of interchange between shipping and production employees, as the Employer's witnesses testified." (DDE at 8). To this point, the Regional Director focuses solely on the testimony of Fleet Manager Tricia Lbayan who testified that shipping employee Molly Shelton "has filled in in production" (Tr. 241). That is the extent of the testimony showing *any* interchange between the classifications in the petitioned-for or amended units. Contrary to the Regional Director's findings, Production Superintendent Maciel did not testify that Shelton occasionally filled in for production employees, only that he questioned Shelton on one occasion when he observed her standing in the production area on a day when Shelton was not scheduled to work. Maciel did not testify that Molly "filled in" in a production capacity (Tr. 237-38).

The Regional Director otherwise wholly ignores the lack of any interchange between truck drivers and production and maintenance employees (Tr. 160). Even assuming one shipping employee "filled-in" in a production capacity, this hardly provides evidence of "frequent" interchange to support shipping employees' inclusion in the unit, let alone that truck drivers share a community of interest with the amended unit.

7. Truck Drivers Have Distinct Terms and Conditions of Employment

The record contains no evidence whatsoever regarding shipping employees' terms and conditions of employment — again because of the Hearing Officer/ Regional Director's ruling that the Parties not to litigate the issue. The Regional Director, however, correctly found that the "Employer applies a different attendance policy to drivers than it applies to Production and Maintenance workers. Drivers are subject to Department of Transportation (DOT) regulations, like random drug testing. Production and Maintenance employees are not subject to DOT

regulations or random drug testing" (DDE at 7). The Regional Director also correctly found that truck drivers have a "separate parking lot and break area" from production and maintenance employees,[6] and "have some disparate interests, such as different licensing requirements, different drug and attendance policies, and different schedules and uniforms" (*Id.*).

Although the Regional Director noted that production employees are "required to wear a safety yellow shirt, steel-toe boots, safety glasses, and ear plugs," she ignores the evidence showing no such requirement for truck drivers, or any evidence as to the uniforms or PPE required of shipping employees (DDE at 4). Moreover, the record showed the production, maintenance, and truck drivers are all on separate seniority lists (Tr. 45-46, 135-36). There is no evidence that shipping employees are included in production, maintenance, or truck driver seniority lists.

Importantly, the Regional Director totally ignores the critical fact that the drivers are unique from the other employees because of the oversight and involvement of BCT regarding basic terms of employment of the truck drivers. The truck drivers are separately governed by BCT regarding hiring, discipline, discharge, administration of random drug tests, and fleet specific safety training for the drivers (Tr. 156-158). BCT has no role with respect to production, maintenance, or shipping employees (*Id.*).

Tellingly, the Regional Director herself identified virtually no shared terms and conditions of employment by employees in the petitioned-for classifications. Instead, she relied on only two minor similarities (health plan and 401(k) retirement plan) to find that "the petitioned-for employees share similar terms and condition of employment" (DDE at 7). The

[6] As discussed above, the record only reflects that truck drivers may, at times, wait in the shipping break area for trailers (Tr. 176-77).

Regional Director does not otherwise give sufficient weight to the numerous differences in employees' terms and conditions of employment, particularly among the truck drivers who are subject to different attendance, drug testing, and schedules than any of the other classifications (Tr. 156, 165-67). Thus, the evidence does not establish that shipping employees share similar terms and conditions with any of the petitioned-for classifications, and certainly do not establish a sufficient community of interest between truck drivers and the other classifications.

A fair examination of the record as a whole reveals not only a dearth of evidence regarding shipping employees' terms and conditions of employment, but that truck drivers do not have sufficiently similar terms and conditions of employment as compared to production, maintenance, and/or shipping employees.

8. The Employees Are Separately Supervised

The Regional Director also wholly ignores her own findings that each of the four classifications are separately supervised and share no meaningful common supervision. Indeed, the Regional Director found that "the Production, Maintenance, Shipping, and Trucking departments each have their own direct supervisors" (DDE at 3). The Regional Director also correctly found that "[t]here is no evidence that [Fleet Manager Tricia] Lbayan supervises Production or Maintenance employees" (DDE at 5 n.9). She separately found that Production Supervisor Ignacio Maciel supervises "various production supervisors" and that "[t]here is no evidence that these production supervisors supervise the drivers" (DDE at 3 n.6). The Regional Director also found that "there is no evidence that [Maintenance Supervisor Mikhail Rosenburg] supervises the drivers" (DDE at 3). Thus, the Regional Director again focuses on the shipping employees whom she unilaterally included in the bargaining unit and overstates and misconstrues the record evidence to reach the desired result.

While the Regional Director found "Shipping Lead/Clerk Jeff [Bingham] instructs hostlers where to place and move trailers," Maciel testified in no uncertain terms that the Shipping Lead is "not a supervisor" (Tr. 56). The Regional Director cites no other record evidence suggesting that Bingham has any supervisory authority over Hostlers or other truck drivers. Thus, even assuming the Shipping Lead "informs" Hostlers where to move trailers, this fact is not probative of any common supervision between shipping and truck drivers.

The Regional Director also misconstrues the record testimony to find that "Maciel also testified that he passes directives to Shipping forklift drivers using Shipping Supervisor Machel LeRoy as a conduit" (DDE at 4). In fact, Maciel merely testified that, if a shipping forklift operator is required to perform a task, Maciel will advise Shipping Supervisor Machel Leroy, who will direct a shipping forklift operator to perform the task (Tr. 55). This testimony does not establish that Maciel "passes directives" to shipping employees or that shipping employees are otherwise required to follow any such directives. Indeed, Maciel testified that he has no authority over the discipline, discharge, or assignment of work of shipping employees nor does the record establish any other indicia of supervisory authority over shipping employees (Tr. 34-41).

The Regional Director relies on the vague and underdeveloped testimony of Over the-Road truck driver Ricky Gamble who claimed that an individual whom he merely suspected to be Shipping Supervisor Leroy "sent him on routes sometimes" (Tr. 213). Hostler Castillejos also testified that "[s]ometimes I deal with [] Mike Leroy" about where to put a trailer (Tr. 228). Based on this flimsy testimony — again caused in no small part by the fact that the Parties were not permitted to litigate the issue — the Regional Director was left to conclude only that "there *might* be some overlap in supervision between the shipping and trucking departments vis-à-vis

Shipping Supervisor LeRoy directing the hostlers" (DDE, at 8) (emphasis added). This is insufficient.

The Regional Director inexplicably ignores the credible testimony of Fleet Manager Lbayan who testified that she is solely responsible for assigning work to truck drivers (Tr. 148-149, 159). Again, given the Parties were not permitted to litigate the issue of whether shipping employees shared common supervision with truck drivers, neither party called Leroy to testify (Tr. 95-96, 180). Nonetheless, the vague and contradictory testimony above fails to establish any common supervision whatsoever between truck drivers and shipping employees.

Stated simply, truck drivers are "separately supervised" and do not share any common supervision with the petitioned-for unit, let alone with the shipping employees the Regional Director unilaterally decided to include in the unit.

Based on the above, the traditional community of interest factors do not support the Regional Director's inclusion of shipping employees in the petitioned-for unit or, even assuming *arguendo* that shipping employees were properly included, that there is any community of interest between truck drivers and the production, maintenance, or shipping employees.

C. The Employer Does Not Seek a Residual Unit of Shipping Employees

The Regional Director also attempts to justify including shipping employees in her DDE on the grounds their exclusion would create a "residual unit" (DDE at 8). The Regional Director's strawman argument that, by arguing that the Regional Director should not have amended the petition to include shipping employees, the Employer seeks an inappropriate "residual unit" of 12 Shipping employees confuses the issues and is neither here nor there.

As discussed, *supra*, in its Reply, the Employer argued that the Regional Director had correctly deferred the inclusion of shipping employees until after the election, and that the Regional Director should not amend the petition, but instead order an election in two units,

production and maintenance on the one hand, and truck drivers on the other. The Employer did not weigh in on the appropriateness of including shipping employees in the unit nor did it advocate that shipping employees should comprise a standalone unit, "residual" or otherwise. Should shipping employees comprise a "residual" unit, it would be of the Regional Director's own creation.

Regardless, at this stage, the Employer merely argues that shipping employees cannot be included in the unit because of the obvious deficiencies in the record evidence concerning the purported communities of interest between shipping employees, and production, maintenance, and truck drivers. *See* Argument, Section II.B., *supra*. The Employer does not seek to create a "separate" or "residual" unit of shipping employees, nor does it seek to exclude shipping employees from any otherwise appropriate unit should the evidence support their inclusion. The evidence as it has been developed thus far, simply does not support their inclusion.

Thus, the Regional Director errantly found that shipping employees share a community of interest with production and maintenance employees and that the amended petition therefore sought an appropriate "plant-wide unit."

D. A Separate Unit of Truck Drivers is Appropriate Under *Boeing*

Even assuming Shipping employees should be included in a unit with production and maintenance employees, the Regional Director errantly refused to direct an election in a separate truck driver unit. In fact, the Regional Director did not find that a separate truck driver unit would be inappropriate (DDE at 9). Nonetheless, any reliance by the Regional Director or the Petitioner on *Boeing*, 368 NLRB No. 67 (September 9, 2019), is misplaced.

In rejecting the union's petitioned-for unit, the Board in *Boeing* gave greater weight to Section 9(c)(5) of the Act, which provides that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29

U.S.C. § 159(c)(5). Indeed, the Board in *Boeing* rejected the Union's petitioned-for unit because there was not a sufficient community of interest or sufficiently distinct interests with excluded employees *despite* the extent of organizing by the Union. Under this reasoning, the Board's *Boeing* decision affords no deference to the Petitioner's desired unit here.

Moreover, essentially none of the similarities in interests which the Board found outweighed the distinct interests of the excluded employees in *Boeing* are present here. In *Boeing*, the employees in the petitioned-for unit had a high degree of and nearly total functional integration with the employees sought to be excluded. All of the employees worked at the same site. The employees in the petitioned-for unit and the employees sought to be excluded shared certain common supervision, in some cases with immediate or secondary supervisors. In *Boeing*, 14 percent of the work for both groups of employees was identical and there was a high degree of job overlap. The Board found that various skill levels and functions between the excluded and included employees overlapped.

As discussed above, *supra*, none of those similarities exist here between the truck drivers and production, maintenance, or shipping employees. Indeed, even taking the undeveloped evidence of functional integration at face value, the record hardly establishes the near total integration present in *Boeing.* Truck drivers do not work exclusively at the Facility and spend a substantial portion of their jobs away from Facility or in the truck yard located 1/4 mile away (DDE at 5-6; Tr. 168-69, 174-75, 197-98). There is little to no evidence of common supervision between truck drivers and other employees. Any evidence of shared "supervision" between shipping employees and truck drivers is vague and *de minimus* at best. *See* Argument, Section II.B.8., *supra*. There is no evidence that truck drivers perform the same work as production, maintenance, or shipping employees or that there is any job overlap whatsoever. There is also no

evidence that truck drivers have common levels of skills or training with other employees. At most, the Regional Director cites to the shared health care and 401(k) plan as evidence of similar interests and this is insufficient under *Boeing.*

Moreover, and contrary to the Regional Director's findings, the Board has not promulgated "guidelines" for units involving drivers (DDE at 7). Although the Employer acknowledges the decisions cited by the Regional Director where the Board found that drivers were properly included in a plant-wide unit even when they lack certain common terms and conditions of employment with production and maintenance employees, the Board's decisions are not uniform, nor has it issued specific "guidelines" on this issue. *See, e.g.*, *Custom Bent Glass Co.*, 1990 WL 1222178 ("Since *Koester Baking Co.*, 136 NLRB 1006, the Board has routinely *excluded* over-the-road truck drivers from production and maintenance bargaining units because such employees are compensated on a different basis than plant workers, spend little or no time at the plant, and have little or no community of interest with plant employees) (citing *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979); *Ideal Laundry & Dry Cleaning Co.*, 152 NLRB 1281, *enf'd.* 372 F.2d 307 (10th Cir., 1967); *Blue Ribbon Laundry*, 64 NLRB 645, 647 (1945) ("[T]he drivers and helpers constitute a distinct group whose working conditions differ from those of the plant workers.")).

Here, because the truck drivers interests are in large part distinct from production, maintenance, and shipping employees, the Regional Director should have directed an election in two units, production and maintenance on the one hand, and truck drivers on the other.

III. THE ERRATA AND REVISED NOTICE OF ELECTION FAILING TO POSTPONE THE HEARING DATE CONTRAVENED BOARD POLICY

The Regional Director's refusal to postpone the election to provide three business days for a revised Notice of Election containing correct eligibility information to be posted for three

business days prior to the election contravened Board policy. "To be eligible to vote in a Board election, the employee must be in the appropriate unit the established eligibility date, which is normally during the payroll period immediately preceding the date of the direction of election . . . ." *NLRB Outline of Law and Procedure in Representation Cases,* § 23-1100 (citing cases). *See also NLRB Casehandling Manual, Part II,* § 11086.3 ("In initial elections, the designated payroll eligibility period will normally be the last period ending before the Direction of Election . . . ."). An issue as to an "unusual eligibility date should be resolved." *Id.* Indeed, "[i]f there is an issue as to an unusual eligibility date, *i.e.*, the use of a date other than the payroll period ending before the approval of the agreement or the Direction of Election . . . the Board agent making the election arrangements [] or conducting the hearing [] should obtain the information necessary for a resolution of this issue." *Id.* at § 11312.1.

In promulgating its new rules, the Board "recognized that the official Board Notice of Election contains important information with respect to employee rights under the Act and that such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. By establishing a specific length of time for posting, the provision made clear to the parties their respective responsibilities and obligations with respect to notice posting and attempted to eliminate unnecessary and time-consuming litigation on this issue." *NLRB Explanatory Statement to Rules and Regulations* § 103.20.

Here, the September 22, 2019 eligibility date contained in the Notice of Election was wrong. The payroll period for the bargaining unit described in the DDE and Notice runs from Monday through Sunday of each week. Given the Regional Director issued the DDE and Notice on Friday, November 1, 2019, the appropriate eligibility date should have been October 27,

2019, which was the payroll period ending immediately before the Regional Director's issuance of the DDE. The Employer notified the Regional Director immediately after discovering the error rather than playing "gotcha" by waiting until after the election to raise the issue.

Indeed, less than an hour after receiving the Errata and revised Notice, the Company emailed the Secretary to Assistant Director, informing her that no one authorized to post the Notice was at the plant after 5:00 p.m. and that "without some clarification or communication concerning the issuance and posting of a revised notice, the last minute correction is . . . without impact." The Regional Director did not respond and no further clarification was provided to the Employer or the voting unit. The Regional Director's last minute issuance of the Errata and Revised Election Notice on the eve of the Election and refusal to postpone the election to allow the Employer three full business days to post the revised Election Notice likely created confusion among voters as to their rights under the Act and defied the purposes of the Notice posting requirement and the NLRB's representation case rules generally.

This conclusion is supported by the large number of employees who did not vote (34 out of 160 or over 20 %) and the fact that the Petitioner received less than a majority of votes from all employees in the voting unit (66/160 or only slightly more than 40%) and is especially significant because a swing of just three votes would have resulted in the Petitioner not receiving a majority of even the votes cast.

CONCLUSION

This case is perhaps the inevitable result of a Regional Director abusing her discretion and dispensing with any notions of due process to the Employer in a single-minded focus to get to a fast election in a voting unit that is wholly unsupported by the record and indeed is inconsistent with her very own prior ruling. For the foregoing reasons, the Employer requests that its request for review be granted, and that the results of the election held on November 7,

2019 be revoked, the DDE reversed, and the petition dismissed and/or a new election conducted conforming to Board law, as described herein.

DATED: November 15, 2019

Very truly yours,

PCA CENTRAL CALIFORNIA CORRUGATED, LLC

*/s/ Kenneth R. Dolin*____

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